No. 05-

IN THE

Supreme Court of the United States

EDMUND KO,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether the Sixth Circuit, in United States v. Cromer, 389 F.3d 662 (6th Cir. 2004), correctly determined that the fact that a defendant may have opened the door to a declarant's testimonial, out of court statement, in violation of Crawford v. Washington, 541 U.S. 36 (2004), will not compel the forfeiture of the right to confrontation absent some wrongful act by the defendant which results in the inability of the declarant to appear as a witness.

2. Whether the Supreme Court should articulate the proper standard upon which a trial judge should determine when a criminal defendant, consistent with the Sixth and Fourteenth Amendments, may require the prosecution to grant immunity to a defense witness.*

Parties to the Proceedings Below

The original parties to this case are as referenced in the caption. There are no additional parties.

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* This question was previously raised in Petitioner's original petition for a writ of *certiorari* under No. 03-1348.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 2005

EDMUND KO,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

Petitioner Edmund Ko seeks a writ of certiorari to review a judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department. Petitioner's original petition (No. 03-1348) resulted in the vacatur of the Appellate Division's initial judgment and this Court's Remand for reconsideration in light of Crawford v. Washington, 541 U.S. 36 (2004). *See* 124 S.Ct. 2839 (2004).

Jurisdiction and Opinions Below

The initial judgment and opinion of the Appellate Division, First Judicial Department, was entered on April 22,

2003 (Appendix B), and is reported at 304 A.D.2d 451, 757 N.Y.S.2d 561 (1st Dept. 2003). The New York State Court of Appeals (Kaye, Ch. J.) denied a timely application for leave to appeal to that Court (1 N.Y.3d 598, 776 N.Y.S.2d 230 [2004]), in a certificate dated January 2, 2004 (Appendix C).

Following this Court's remand on June 14, 2004 (124 S.Ct. 2839 [2004]), the Appellate Division again affirmed the judgment of conviction in a judgment and opinion entered on February 3, 2005 and reported at 15 A.D.3d 173, 789 N.Y.S.2d 43 (1st Dept. 2005) (Appendix A). The New York State Court of Appeals (Kaye, Ch. J.) again denied a timely application for leave to appeal to that Court, in a certificate dated August 29, 2005 (Appendix D).

The Supreme Court has jurisdiction to entertain this petition for a writ of certiorari pursuant to 28 U.S.C. §1257(a), as well as Rules 10 (b), (c) and 13 of the Rules of the Supreme Court.

Constitutional Provisions Involved

United States Constitution, **Amendment V**, provides in pertinent part:

> No person shall be...compelled in any criminal case to be a witness against himself...nor be deprived of life, liberty, or property without due process of law...

United States Constitution,**Amendment VI**,provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...

United States Constitution, **Amendment XIV**, provides in pertinent part:

> No state shall...deprive any person of life, liberty, or property, without due process of law...

Statement of the Case

A. The Indictment

Under New York County Indictment 2449/98, Petitioner **Edmund Ko** was charged with Murder in the Second Degree (New York Penal Law §125.25[1] [McKinney's 1998]). It was alleged that, on the night of March 18, 1998, he had caused the death of Columbia University law student **Lynda Hong** by cutting her throat with a sharp instrument in her ground-floor studio apartment at 548 W. 113th Street, in Manhattan.

The District Attorney theorized that Petitioner had caused Hong's death in an effort to ingratiate himself to his then current girlfriend, **Claudia Seong**, with whom he had been obsessed. Ms. Seong was said to have been insulted by comments apparently directed toward her by the deceased, Petitioner's girlfriend while they were undergraduate students at Cornell University.

B. The Defense

It was the defense to the charges that other persons had committed the offense. Specifically, the defense contended that Seong (whom the prosecution informed the jury had not been involved in the crime), along with one of her acquaintances, had possessed a far greater motive than did Edmund Ko to cause Lynda Hong's death.

C. The Court's In limine Rulings

Prior to trial, the District Attorney sought to preclude the defense from introducing certain statements attributed to **Claudia Seong** and her friend, both of whom had been

interviewed by detectives. During oral argument on the issue, the court stated that "I think it's understood that Claudia Seong, whether she actively participated, is an accomplice in the killing of Lynda Hong, or whether it was simply her jealousy that precipitated this murder, without her participation, that is she is a critical player." Therefore, the court ultimately allowed some, but not all, of the proffered statements.

Specifically, the defense had made a limited request to admit Seong's statement to police that "the bloody sweatshirt found in Lynda Hong's apartment belonged to her." The court, after due consideration, stated that it "believe[d] that is a statement against Ms. [Seong's] penal interest, and I am admitting it for that purpose."

For her part, the prosecutor never indicated that she intended to introduce other statements made by Seong during her interrogation by the police. Thus, at no time did the prosecutor suggest that she intended to introduce Seong's additional statement that the sweat pants also found at the scene had belonged to Petitioner Ko. Indeed, unlike the limited statement which the defense sought to offer, those statements by Seong purportedly implicating Petitioner -- as the Appellate Division has agreed, Appendix A, at 2a -- are certainly "testimonial within the meaning of" Crawford v. Washington, 541 U.S. 36 (2004).

D. The Prosecutor's Opening Statement

In her opening statement to the jury, the prosecutor completely eliminated the personal involvement of Claudia Seong in the charged murder. The jury was therefore told that "when [Petitioner] went to Lynda Hong's apartment he went alone. Unlike the... [evidence of the uncharged assault], this was no joint undertaking by he [*sic*] and Claudia in killing Lynda Hong. Ko went to her apartment alone that night and slit her throat there."

Knowing full well, however, that Seong would be invoking the Fifth Amendment were she to be called, the prosecutor also informed the jury that it would "hear testimony that after [Petitioner] went to Lynda Hong's apartment and murdered Lynda Hong...he told Claudia Seong what he had done for her, and that he had done it for her." Defense counsel's immediate application for a mistrial in the face of this inadmissible confession, absent any representation or expectation that Seong would be testifying and thereby confronted, was denied. Also rejected was counsel's alternative request that the statement be stricken. All the court did was instruct the jury that opening statements do not constitute evidence.

In the course of the trial, Seong's alleged central role as the motivational force behind Petitioner's actions was repeatedly emphasized by the prosecutor. Likewise, the "Claudia Seong" factor was repeatedly stressed by the prosecutor in her summation. In fact, at the very beginning of her closing argument, the prosecutor insisted that Petitioner "was obsessed with this woman, Claudia Seong."

E. Defense Requests to Have Claudia Seong Invoke the Fifth Amendment in the Jury's Presence

Because she was expected to invoke the Fifth Amendment when subpoenaed, defense counsel repeatedly sought to have Seong do so in the presence of the jury. Alternatively it was requested that she be forced to testify with immunity and thereby be subject to confrontation. Moreover, at the very beginning of trial, defense counsel asked if the District Attorney and the court would be willing to give Seong immunity to testify. At the time, the court stated that the application was premature, but that "[i]t's something I will think about."

Thereafter, in the middle of the trial, through inter-state process, Seong was brought into court for purposes of a hearing in furtherance of her anticipated invocation of the Fifth Amendment. Counsel then elaborated upon his two applications: First, it was urged that such invocation be in the presence of the jury, because it would "fulfill[] the compulsory process right which defendant has under the Sixth Amendment, and concomitant right in the state of New York." Counsel maintained that "given the unique facts of this case, it is a due process right of Mr. Ko to have the witness...invoke the privilege in front of the jury."

The People, however, successfully reminded the court that the matter was within their discretion, adding:

> [I]t seems to be lost somewhere in all of this, that Ms. Seong is unavailable to both sides, and, in fact, Ms. Seong is unavailable and thus the People are incapable of bringing out what is probably some of the most damaging evidence against Edmund Ko, that fact that Edmund Ko confessed to Ms. Seong that he killed Lynda Hong and the fact that he brought back to Ms. Seong Lynda Hong's wallet to prove that he had done that.

Responding to these remarks, defense counsel sought to clarify the record:

> I don't really think it lies in the prosecution's mouth to argue to this court that they are prejudiced because the witness is unavailable to them and they would like to use the witness to bring out a lot of inculpatory information. *They have got the power to give immunity. They have said to this jury that this man alone is*

> *responsible for the killing. Give Claudia Seong immunity*. Should the prosecutor, she cannot get up in front of this court and ask your Honor to tell, to prevent me from doing this in front of the jury, that they are prejudiced. She thinks this is an important witness, she thinks she has inculpatory information to bring out from this witness, she thinks this witness will give her a slam dunk case? *Put her on the witness stand. She's got the power to give immunity* . Her lawyers in the District Attorney's Office have been going back and forth, undoubtedly back and forth for two years whether to give immunity. They've got the power. (Emphasis added.)

The court soon ruled only that Seong's invocation of the Fifth Amendment would be done outside the jury's presence. Thereafter, in the jury's absence, Seong repeatedly invoked the Fifth Amendment as to any question involving the subject of Lynda Hong's homicide.

F. <u>The Challenged Introduction of Claudia Seong's Hearsay Statements to the Investigating Detective</u>

In furtherance of the prosecution's wholly circumstantial case-in-chief, the District Attorney called sixty-three witnesses. They included police officers and detectives; responding fire officers; medical examiners; various forensic scientists and technicians; custodians of records/tapes/documents; the vigorously challenged complainant in an uncharged New Jersey offense which was awaiting prosecution; friends, acquaintances and a sister of the deceased; and various other persons possessing allegedly relevant information; and several stipulations.

A central prosecutorial witness was **Detective Robert Mooney**, who had been in charge of the investigation. He was allowed to testify -- over repeated objection -- that, prior to Petitioner's arrest, when Seong had been shown photographs of a bag of clothes found at the homicide scene, she began to cry uncontrollably, and was unable to respond to any further questions for a period of time. Then, upon composing herself, *Mooney related Seong's stating that the shirt was hers, and the pants belonged to Petitioner, who also wore the shirt on occasion.* (In separate testimony, Seong's roommate identified the clothes as having been shared by Seong and Petitioner.)

Mooney was then allowed to add that after again crying almost "convulsive[ly]," Seong identified the actual clothing when they were laid out on a table at the police laboratory. *At that time, according to the detective, Seong repeated her assertion that although the shirt belonged to her, Petitioner wore it often, and that the pants belonged to him.*

Although defense counsel's repeated objections were all denied despite the fact that such testimony had never been broached by the prosecutor in the course of the court's earlier *in limine* rulings, he later revisited these rulings:

> I am permitting [sic] under the confrontation clause to question this witness with respect to this conversation beyond the mere words on the page given that your Honor permitted over objection without limiting instruction to the jury, the prosecutor, not the defense, who had opposed a motion in limine to allow the defense to get it in evidence...

In response -- and without distinguishing between the limited proffer by the defense of Seong's declaration against penal interest, and the far more extensive non-confronted

hearsay testimony elicited by the prosecutor -- the court stated:

> There's no reason why she's not allowed [*sic*] to bring out something that you have specifically asked me to admit in evidence and I allowed you to bring in evidence under these circumstances; not allow her to bring it out in my view would be a fair – that is I allowed it counselor. That is why I allowed it.

G. Renewed Applications for Claudia Seong To be Given Immunity

Thereafter, in the face of even further prosecutorial attempts to admit Petitioner's purported confession to Seong -- which, as noted, the prosecutor, over a denied mistrial application, had already brought to the jury's attention in her opening statement -- defense counsel protested anew:

> If they want to bring out what Claudia Seong claims Edmund Ko said to her, the way they should do that is***
>
> *...Let them put Claudia Seong on the witness stand, and then the defendant, under the confrontation clause, both in the State constitution and the Federal constitution would have a right to cross-examine her.*
>
> *And they have the power and the opportunity to put her on the witness stand. And they have chosen not to do so.* (Emphasis added.)
>
> And we couldn't even begin to cross-examine.
>
> That in fact, as I asked her at the hearing, outside the presence of the jury when your Honor was

> overruling our objection, as she intended to do, and as she did, took the Fifth Amendment outside the presence of the jury. I asked her one of the questions: Isn't it a fact when you spoke to the police and said that Edmund Ko said this to you, you were deliberately conferring the guilt from yourself and placing it on him? You were deliberately shifting the blame to him? And she said, I take the Fifth Amendment with respect to that question. *So now to allow her to bring that out without giving us the opportunity to cross-examine her is, in our view, it would totally violate the confrontation clause.*
>
> *And they have the power to put her on the witness stand.* (Emphasis added.)

Although precluding the introduction of such testimony, the court indicated a willingness to entertain the alternative question pressed by the prosecutor, *to wit*: "was that arrest based at least in part upon something Ms. Seong told the police within the hour before Mr. Ko's arrest, yes or no[]."According to the court, "there are sometimes people adopt alternative approaches to things which are less prejudicial than other approaches and that's why we do certain things." In response, defense counsel added:

> Judge, I appreciate that. All of this in [*sic.*] the prosecutor's hands. *They have to put Claudia Seong on the witness stand.* They've told you, your Honor she's got nothing to do with this murder, *giving [sic] her the immunity that she's been begging for the murder and put her on the witness stand to ask her questions, sir.* (Emphasis added.)

Ultimately, the court precluded the People from having the detective refer to Seong, other than as one of several people with whom the police had been speaking prior to arresting Petitioner. The court, therefore, merely sustained the defense objection to the proposed testimony without ruling on the application for Seong to be immunized.

The jury convicted Petitioner of the charged offense. The trial judge later sentenced him to a term of imprisonment of twenty-five years to life.

H. The New York Appeals

1. The Original Appeal

On the original appeal of the judgment to the Appellate Division, First Judicial Department, Petitioner claimed, *inter alia*, that he had a due process right to have Claudia Seong, the central figure in the case around whom the entire prosecution was theorized, immunized and made available for cross-examination. He also contended that the challenged introduction of her statement regarding Petitioner's ownership of the sweat pants violated his Sixth Amendment right to confrontation. The District Attorney raised preservation challenges to each of these contentions. Moreover, as to the confrontation claim, the prosecution advanced an "opening the door" argument, urging that "defendant seems to conveniently to forget that it was he who requested that these statements be admitted even though they constituted hearsay..."

The Appellate Division addressed the merits of both issues. In ruling against Petitioner on the immunity issue, the Court stated:

> Defendant was not deprived of any constitutional rights by the People's refusal to grant immunity to his new girlfriend (*see* People v. Adams, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902 [1981];

> People v. Shapiro, 50 N.Y.2d 747, 431 N.Y.S.2d 422 [1980]). There was no bad faith or abuse of prosecutorial discretion. Furthermore, defendant's inability to call the new girlfriend as a witness because of her assertion of her Fifth Amendment privilege did not adversely affect his defense.

Appendix B, at 5a.

Concerning the introduction of Seong's testimonial hearsay statements to Det. Mooney, the Appellate Division likewise held against Petitioner on the merits:

> The other challenged rulings were proper exercises of discretion which did not deprive defendant of his right to confront witnesses and present a defense (*see* Crane v. Kentucky, 476 U.S. 683, 689-690 [1986]; Delaware v. Van Arsdall, 475 U.S. 673, 678-679 [1986]).

Appendix B, at 6a

Leave to appeal to the New York Court of Appeals was thereafter denied by Chief Judge Kaye. Appendix C.

2. The Appeal Upon Remand

Following this Court's vacatur of the judgment of the Appellate Division and the remand to that Court for re-consideration in light of Crawford v. Washington, the Appellate Division again affirmed. Thus, although again finding that the Crawford issue had been appropriately preserved and that the challenged statement was indeed testimonial in light of that decision since it had been certainly admitted for its truth, the Appellate Division determined that there had been no error. The Court agreed with the prosecution that Petitioner had opened the door to the introduction of such hearsay statement. As explained:

> Defendant opened the door to the admission of the entire statement concerning the clothing found at the murder scene by raising the issue of the clothing in his opening statement and in seeking, in opposition to the People's in limine motion, leave to introduce the girlfriend's statement that the shirt found belonged to her. Once defendant insisted upon introduction of the portion of the statement regarding the girlfriend's ownership of the shirt, the entire statement became admissible because the admission of that portion of the statement, by itself, would misrepresent the meaning of the conversation...[citations omitted]. A contrary holding would allow a defendant to mislead the jury by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context. Accordingly, we find no violation of defendant's right of confrontation (*see e.g.* United States v. Ramos, 861 F.2d 461, 468 [6th Cir.1988], *cert. denied* 489 U.S. 1071 [1989]; *but see* United States v. Cromer, 389 F.3d 662, 678- 679 [6th Cir.2004]).

Appendix A, at 2a-b.

In any event, according to the Appellate Division, the introduction of this material was harmless, if it were error at all. *Id.* Thereafter, leave to appeal to the New York Court of Appeals was again denied by Chief Judge Kaye in a certificate dated August 29, 2005. Appendix D.

Reasons for Allowance of the Writ

A. The Supreme Court Should Consider Whether the Sixth Circuit, in United States v. Cromer, 389 F.3d 662 (6th Cir. 2004), Correctly Determined That the Mere Fact That a Defendant May Have Opened the Door to a Testimonial, Out of Court Statement, in Violation of Crawford v. Washington, 541 U.S. 36 (2004), Should Not Compel the Forfeiture of Such Right in the Absence of Some Wrongful Act by the Defendant Which Results in the Inability of Such Declarant to Appear as a Witness

The obviously devastating hearsay declaration of Claudia Seong -- who, upon questioning by Detective Mooney, had identified the sweat pants found at the homicide scene as belonging to Petitioner -- was a testimonial statement within the meaning of Crawford, as the Appellate Division agreed. Such had been admitted for its truth; it had been made in the course of a police interrogation; and the declarant Seong was unavailable at trial due to her invocation of the Fifth Amendment. United States v. Salerno, 505 U.S. 317, 320 (1992); Lee v. Illinois, 476 U.S. 530, 551 (1986) (Blackmun, J., dissenting), United States v. Jackson, 335 F.3d 170, 177 (2d Cir. 2003).

Specifically, owing to the prosecutor's arbitrary refusal to bestow immunity on Seong (despite her informing the jury that Seong had not been involved in the charged crime), Petitioner never had an opportunity to subject Seong's testimonial statements to cross-examination. At the least, the Appellate Division agreed that the issue of the denial of Petitioner's confrontation rights had been adequately preserved at trial by defense counsel.

On the other hand, the Appellate Division premised its affirmance on the notion that the door had been opened by Petitioner. As explained *ante*, however, this is not so since the defense had only sought to introduce the statement of Seong's personal ownership of the **shirt** as a declaration against penal interest. But, *even if counsel had in fact opened the door*, the ruling of the Appellate Division, as the highest New York court to address this issue, puts it squarely in conflict with the Court of Appeals for the Sixth Circuit in United States v. Cromer, 389 F.3d 662 (6th Cir. 2004), the only Circuit Court to have specifically explicated upon this question. *See* Supreme Court Rule 10(b).

In Cromer, the Sixth Circuit, finding a clear Crawford violation, noted that the defense had opened the door to the introduction of such testimonial statement. Nonetheless, the Court reversed the conviction, holding that, under Crawford, the opening of the door by the defense was an insufficient basis, as a matter of law, to deny relief:

> As Crawford demonstrates, however, the Confrontation Clause, when properly applied, is not dependent upon "the law of Evidence for the time being." Crawford, 124 S.Ct. at 1364, 1370 (quoting 3 J. Wigmore, *Evidence* § 1397, p. 101 (2d ed. 1923)) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence ...."); *see also* Friedman, *Confrontation,* 86 Geo. L.J. at 1020 ("[W]e might well pause at a doctrine that in effect conforms a constitutional right, a part of the Bill of Rights, to the contours designed-in a process not bearing the remotest resemblance to the amendment procedure established by Article V of the Constitution-by a committee of drafters

of evidentiary rules for the federal courts.").

389 F.3d at 678.

Thus, while allowing, with reference, *inter alia*, to its earlier decision in United States v. Ramos, 861 F.2d 461, 468 (6th Cir.1988), *cert. denied* 489 U.S. 1071 (1989), that "[a]s a matter of modern evidence law, the district court may well have been correct in admitting O'Brien's redirect testimony about the description provided by the informant since Cromer, on cross-examination, had opened the door to the subject by asking about that description[]" (*id.*), the Cromer court essentially held that, under Crawford, the rules had changed where the evidentiary issue implicates the confrontation clause:

> The pertinent question, however, is not whether the CI's statements were properly admitted pursuant to "the law of Evidence for the time being." Crawford, 124 S.Ct. at 1364. Rather, the relevant inquiry is whether Cromer's right to confront the witnesses against him was violated by O'Brien's redirect testimony. *If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation.* In this, too, we agree with Professor Friedman, who has postulated that a defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness. Friedman, *Confrontation,* 86 Geo. L.J. at 1031. If, for

> example, the witness is only unavailable to testify because the defendant has killed or intimidated her, then the defendant has forfeited his right to confront that witness. *A foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his rights under the Confrontation Clause.* O'Brien's redirect testimony relating the CI's physical description therefore violated Cromer's right of confrontation.

389 F.3d at 679; emphasis added. *See also* United States v. Pugh, 405 F.3d 390, 400 (6th Cir. 2005);

No only does the Appellate Division now explicitly reject this premise, but so has the Michigan Court of Appeals. *See* People v. Walker, 265 Mich. App. 530, 538, 697 N.W.2d 159, 164 (Ct. of Appeals 2005) (noting that neither the Michigan court nor federal courts of appeals and district courts other than the Sixth Circuit "read Crawford as establishing such a broad principle"), *leave to appeal granted*, 472 Mich. 928, 697 N.W.2d 527 (June 17, 2005). It follows that the Supreme Court should grant this petition to determine whether Cromer in fact correctly explicates whether, in the wake of Crawford, normal evidentiary principles, such as opening the door, will not -- and cannot -- obviate the resultant constitutional error arising out of the introduction of a testimonial statement in violation of a defendant's Sixth Amendment rights to confrontation.

Finally, it is noted that the Appellate Division's alternate finding that the constitutional error complained of was harmless beyond a reasonable doubt is simply not an impediment to this petition. As Petitioner would demonstrate to the Court, on this particular record, where the entirety of the prosecution's case certainly revolved around the influence and actions of the same

declarant, Claudia Seong, we respectfully urge that nothing short of her having been immunized (*see* Part I, *ante*), and thereby made available for cross-examination, could cure the resulting constitutional defect. For, in the end, as we would explain, the core damage from this highly inappropriate testimony was incalculable on this particular record.

Consequently, because this "Court has the power to review the record *de novo* in order to determine an error's harmlessness. *See* [Chapman v. California, 386 U.S. 18, 24 (1967)]; Satterwhite v. Texas, 486 U.S. [249] at 258 [1988]...[,]" "it must be determined whether the State has met its burden of demonstrating that the admission of the [Seong statement] did not contribute to [Petitioner's] conviction. Chapman, *supra*, 386 U.S. at 26." Arizona v. Fulminante, 499 U.S. 279, 295-296 (1991). We respectfully submit that upon plenary review of this case, such burden will not be met by the prosecutor.

B. The Supreme Court Should Articulate the Proper Standard upon Which a trial Judge Should Determine When a Criminal Defendant, Consistent with the Sixth and Fourteen Amendments, May Require the Prosecution to Grant Immunity to a Defense Witness

This petition also reiterates the initial issue presented in Petitioner's original petition (No. 03-1348) concerning whether the Appellate Division has "decided an important question of federal law that has not been, but should be, settled by this Court..." Supreme Court Rules, Rule 10 (c). Petitioner again respectfully submits that this case satisfies these prerequisites.

Specifically, certain procedural guarantees are sacrosanct at criminal trials, and arise out of the Due Process Clause of the Fourteenth Amendment. Specifically, the right to present a

defense, pursuant to the Sixth Amendment, has been referred to as one of the "minimum essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294 (1973); *see also* Washington v. Texas, 388 U.S. 14, 20 (1967).

Part of this Sixth Amendment right, of course, is the ability of an accused to call witnesses whose testimony is "material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). Yet, as demonstrated in this case, that ability can be severely hampered when a prosecutor, absent any obligation to demonstrate a rationale for such decision, refuses to grant immunity to a person whom the defense has demonstrated is central to a viable defense. It is essential that the Supreme Court determine whether th exercise of such prosecutorial power is not without limitation, and can, under certain circumstances, amount to an abuse of discretion.

In this regard, to date, it appears that the Supreme Court, and certainly the courts of New York, have not clearly delineated an appropriate standard under which to determine the propriety of such a prosecutorial refusal, and whether mere arbitrariness, *vel non*, can amount to a deprivation of fundamental fairness. For example, in People v. Chin, 67 N.Y.2d 22, 32, 499 N.Y.S.2d 638, 646 (1986), the New York Court of Appeals noted:

> [T]he prosecutor's discretion to confer immunity on witnesses called by defendants is quite broad (New York CPL §50.30 [McKinneys 2003]; People v. Owens, 63 N.Y.2d 824, 482 N.Y.S.2d 250 [1984]; People v. Adams, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902 [1981]; People v. Shapiro, 50 N.Y.2d 747,431 N.Y.S.2d 422 [1980]; People v. Sapia, 41 N.Y.2d 160, 391 N.Y.S.2d 93 [1976], *cert. denied* 434 U.S. 823). That discretion will not be deemed to have been

> abused unless, for example, the prosecutor builds his case with immunized witnesses but denies the defendant a similar opportunity (*see, e.g.*, People v. Adams, *supra*, 53 N.Y.2d at p. 247).

That nebulous standard, referenced by the Appellate Division citations to Adams and Shapiro, Appendix B, at 5a, allows for no more than an *ipse dixit* determination by a reviewing court that there was no abuse of prosecutorial discretion. But that offers little, if any, guidance to trial judges in future cases. Thus, *nisi prius* courts have no cognizable test to apply as to what, in a proper case, rises to a level of unconstitutional abuse, and hence, amounts to a due process deprivation in violation of the Fourteenth Amendment.

The New York Court of Appeals' other decisions in this area, all of which antedated Chin, offer no greater illumination. *See e.g.* People v. Arroyo, 46 N.Y.2d 928, 930, 415 N.Y.S.2d 205, 206 (1979), where, amidst a finding of no denial of due process, the court simply stated that "[i]t suffices for present purposes to note that the witness here was not an agent of the law enforcement authorities or otherwise in any way a part of the prosecutorial apparatus...[citing Sapia]." However, the Court never articulated any standard of analysis in furtherance of determining precisely what being "part of the prosecutorial apparatus" might entail.

Even in Shapiro *supra,* wherein the Court of Appeals actually reversed an affirmance of a conviction, the decision in support of such a rare action was certainly unenlightening. There, the court was confronted with a situation which it viewed to be distinct from what had been involved in Sapia and Arroyo. In Shapiro, confronted with the prosecutor's insistence that certain defense witnesses testify consistent with their prior testimony, those individuals called by the defense invoked the Fifth Amendment in the absence of prosecutorial grants of

immunity for any possible perjury charges.

Though addressing its due process-based discussion in Sapia, the Court of Appeals merely concluded that "there are times when the exercise of this constitutional right may press on a defendant's due process right to a fair trial and to compulsory process (U.S. Const., 6th, 14th Amendments., N.Y. Const. art. I, sec. 6)" (50 N.Y.2d at 760). Thus, without setting forth any guidelines in furtherance of measuring the bounds of such standards, the court merely declared:

> Given that the power to confer immunity and thereby to compel testimony from a witness who asserts his privilege resides within the discretion of the prosecutor (see New York Criminal Procedure Law §50.20, subd. 2, par. [b]), in an appropriate case it is not too much to expect that the exercise of this prosecutorial discretion be tempered by an obligation to respond to such a problem. On that principle, in cases in which witnesses favorable to the prosecution are accorded immunity while those whose testimony would be exculpatory of the defendant are not, or in ones where the failure to grant immunity deprives the defendant of vital exculpatory testimony, due process may be violated (*see* People v. Sapia, *supra*, at p. 166; People v. Arroyo, *supra*, at p. 930; Earl v. United States, D.C.Cir., 361 F.2d 531, 534, n.1 (Burger, J.), *cert. den.* 388 U.S. 921; United States v. Gaither, D.C.Cir., 539 F.2d 753 (Bazelon, J., statement on denial of rehearing en banc), *cert. den.* 429 U.S. 961; United States v. Saettele, 8 Cir., 585 F.2d 307, 310-314 (Bright, J., dissenting); State v. Broady, 41 Ohio App.2d 17, 321 N.E.2d 890; Westen, Compulsory Process Clause, 73

Mich.L.Rev. 71, 166-170; Note, Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv.L.Rev. 1266).

Shapiro, *supra*, 50 N.Y.2d at 760, 431 N.Y.S.2d at 429.

In stark contrast, the United States Courts of Appeals have promulgated at least two distinct modes of analysis in this area. They include an "effective defense" standard on the one hand, and a "prosecutorial misconduct" standard on the other. *See* United States v. Angiulo, 897 F.2d 1169, 1190-92 (1st Cir. 1990) (contrasting these distinct modes of analysis, and collecting cases); United States v. Mohney, 949 F.2d 1397, 1401 (6th Cir.) (same), *cert. denied*, 504 U.S. 910 (1992); United States v. Capozzi, 883 F.2d 608, 613-614 (8th Cir. 1989) (same), *cert. denied*, 495 U.S. 918 (1990); *See also* Carter v. United States, 684 A.2d 331, 338-45 (D.C. Ct. App. 1996) (en banc) (same).

The minority approach, *i.e.*, the "effective defense theory," "holds that a court has the inherent power to immunize witnesses whose testimony is essential to an effective defense."Angiulo, 897 F.2d at 1190. This "effective defense" standard of analysis, alone embraced by the **Third Circuit**, *see* Government of Virgin Islands v. Smith, 615 F.2d 964, 969-74 (3rd Cir. 1980), adheres to the notion "that when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the Government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial." Angiulo, 897 F.2d at 1191. *See also* United States v. Santtini, 963 F.2d 585, 597, 598, n. 6, 599 (3rd Cir. 1992) (discussing Smith and noting the criticism thereof, as well as the limiting of its applicability, in subsequent decisions).

The latter, "prosecutorial misconduct" standard, is relied upon by most other Circuits. Generally, it entails an analytical approach where the district court requires a prosecutor to grant immunity to a defense witness, at risk of dismissal or judgment of acquittal, "where there exists prosecutorial misconduct arising out of the Government's deliberate effort to distort the fact-finding process." Angiulo, 897 F.2d at 1190.

For example, the **Second Circuit**, as reiterated in United States v. Bahadar, 954 F.2d 821, 826 (2d Cir.), *cert. denied*, 506 U.S. 850 (1992) has enunciated a long-standing "three-part test for requiring the government to grant defense witness immunity at the risk of dismissal of the indictment." *See also* United States v. Diaz, 176 F.3d 52, 115 (2d Cir.), *cert. denied sub. nom.*, Rivera v. United States, 528 U.S. 875 (1999); United States v. Turkish, 623 F.2d 769, 773 (2d Cir. 1980), *cert. denied*, 449 U.S.1077 (1981). According to this sequential analysis,

> **first**, the district court must find that the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the fifth amendment. **Second**, the witness's testimony must be 'material, exculpatory, and not cumulative.' **Third,** the testimony must be unobtainable from any other source.

The remaining courts of appeals have pursued different variations of this mode of analysis, in one approach or another. Some have held that a district court has residual authority to grant immunity on its own initiative, and others have determined that the only authority vested in the district court is to compel the prosecutor, in the face of certain factors, to consent to immunity at pains of sanctions. Additionally, while most circuit courts have discussed the defense proffer in terms of "exculpatory," the

Ninth Circuit requires only that the proposed testimony be "relevant."

First Circuit

United States v. Angiulo, *supra,* 897 F.2d at 1191-1192 ("Despite the nearly universal rejection of the effective defense theory, courts have held that the due process clause does constrain the prosecutor to a certain extent in her decision to grant or not to grant immunity. If a prosecutor abuses her discretion by intentionally attempting to distort the fact-finding process, then a due process violation exists and court may order the prosecutor to grant immunity or face a judgment of acquittal."); *Accord*: United States v. Mackey, 117 F.3d 24, 27 (1st Cir.), *cert. denied*, 522 U.S. 975 (1997);

Fourth Circuit

United States v. Abbas, 74 F.3d 506, 512 (4th Cir.) ("the district court is without authority to confer immunity *sua sponte* [citing United States v. Klauber, 611 F.2d 512, 517 (4th Cir. 1979)]...And the prosecution is vested with the sole discretion to grant immunity...On occasion, however, the district court can compel the prosecution to grant immunity..."), *cert. denied*, 517 U.S. 1229 (1996). *See also* United States v. Moussaoui, 382 F.3d 453, 466-67 (4th Cir. 2004) (same);

Fifth Circuit

United States v. Chagra, 669 F.2d 241, 258-59 (5th Cir. 1982) ("This Circuit has consistently held that a district court does not possess the statutory, common law, or inherent authority either to grant use immunity to a defense witness over the government's objection or to order the government to do so. ...[footnote omitted]. At the same time, we have suggested without deciding that the federal constitution may in some extraordinary circumstances require either defense witness immunity or some remedial action by a district court to protect a defendant's right to a fair trial...[footnote omitted]", citing,

inter alia, United States v. Thevis, 665 F.2d 616, 639 [5th Cir. Unit B], *cert. denied*, 456 U.S. 1008 [1982]), *reh. denied*, 673 F.2d 1321 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982), *overruled on other grounds*, Garrett v. United States, 471 U.S. 773 (1985) *see also* United States v. Follin, 979 F.2d 369, 374 (5th Cir. 1992), *cert. denied sub. nom.* Crawford v. United States, 509 U.S. 908 (1993);

Sixth Circuit

United States v. Emuegbunam, 268 F.3d 377, 401 (6th Cir. 2001) (rejecting the "effective defense exception" by noting that "[w]e have consistently held that a district court is without authority either to grant immunity to a witness who asserts his Fifth Amendment privilege against self-incrimination or to force the government to do so" [citing United States v. Mohney, *supra* and United States v. Talley, 164 F.3d 989, 997 (6th Cir.), *cert. denied*, 526 U.S. 1137 (1999) (internal quotes omitted)]. On the other hand [again citing Talley], although "[i]mmunity might be warranted to remedy prosecutorial misconduct..., [w]e have yet to decide whether immunity represents a valid remedy for such conduct."), *cert. denied*, 535 U.S. 977 (2002);

Seventh Circuit

United States v. Hooks, 848 F.2d 785, 799-803 (7th Cir. 1988) ("the trial court lacks authority to provide immunity for a defense witness absent a request by the Government...Indeed the court is powerless to direct the government to seek immunity for a defense witness who exercises his fifth amendment privilege against self-incrimination.***Nevertheless the prosecutor's power to seek or to refuse immunity is limited by the constitutional right to due process of law. Accordingly, this appellate court will not review a prosecutor's immunization decisions in the absence of a substantial evidence showing that the prosecutor's actions amounted to a clear abuse of discretion violating the due process clause" [internal quotes omitted]); United States v. Taylor, 728 F.2d 930, 935 (7th Cir. 1984)

(same); *But see* United States v. Herra-Medina, 853 F.2d 564 (7th Cir. 1988) ("In an appropriate case the refusal of the government to immunize a defense witness might be at once so damaging to the defense and so unjustifiable in terms of legitimate governmental objectives that the refusal to grant immunity would be a denial of due process of law to the defendant and preclude his conviction..."); *Accord*: United States v. Burke, 425 F.3d 400 (7th Cir. 2005);

Eighth Circuit

United States v. Capozzi, *supra*, 883 F.2d at 613-614 ("Neither the Supreme Court nor this Court have ruled on whether a court has inherent authority to grant or use immunity. We have, however, previously indicated our doubt that such a power lies in the judiciary."*** "Every court of Appeals which has considered the question has rejected the Third Circuit's *Smith* holding as being in violation of the doctrine of separation of powers" *** "Even assuming a district court has authority to immunize defense witnesses, unaided by 18 U.S.C. §§6002 and 6003, it is clear that such an order is an extraordinary remedy, to be used sparingly, and then only where the proffered evidence is *clearly exculpatory*...[footnote and internal quotes omitted] [emphasis in original]."); United States v. Blanche, 149 F.3d 763, 769 (8th Cir. 1998) (discussing Capozzi and stating that "we again decline to resolve the ultimate question of whether a court has inherent authority to fashion such extraordinary relief as judicial immunity of potential defense witnesses..., where palpable judicial or government interference has been shown."[internal quotes omitted]); *Accord*: United States v. Bowling, 239 F.3d 973, 976 (8th Cir. 2001);

Ninth Circuit

United States v. Lord, 711 F.2d 887, 891-92 (9th Cir. 1983) (We agree with the Third Circuit's holding in Government of Virgin Islands v. Smith, *id.* at 968, that an unrebutted prima facie showing of prosecutorial misconduct that could have

prevented a defense witness from giving relevant testimony justifies remand for an evidentiary hearing. Therefore, we reverse and remand this case for an evidentiary hearing on whether the prosecutor intentionally distorted the fact-finding process by deliberately causing Cook to invoke his fifth amendment privilege. If the district court finds such prosecutorial misconduct by a preponderance of the evidence...[footnote omitted], it should enter a judgment of acquittal for Lord unless the prosecution invokes 18 U.S.C. §6002-6003 by asking the district court to extend use immunity to Cook at a new trial."); United States v. Westerdahl, 945 F.2d 1083, 1086-88 (9th Cir. 1991) ("to satisfy the first prong of the *Lord* test, a defendant need not show that the testimony sought was either 'clearly exculpatory' or 'essential to the defense'; the testimony need only be relevant." *** As to the second *Lord* prong, "misconduct is not confined solely to situations in which the Government affirmatively induces a witness not to testify in favor of a defendant."); *Accord*: United States v. Young, 86 F.3d 944, 948 (9th Cir. 1996).

Tenth Circuit

In the recent case of United States v. Serrano, 406 F.3d 1208 (10th Cir.), *cert. denied*, ___S.Ct.___, 2005 WL 1874525 (Oct. 3, 2005), the Tenth Circuit again rejected the rationale of the Third Circuit in Smith. *See also* United States v. Hunter, 672 F.2d 815, 818 (10th Cir. 1982) ("Courts have no power to independently fashion witness immunity under the guise of due process." However "where the prosecutor's denial of immunity is a deliberate attempt to distort the fact finding process, a court could force the government to choose between conferring immunity or suffering acquittal [citing Government of Virgin Islands v. Smith, *supra*]) *Id.*; *Accord:* United States v. Chalan, 812 F.2d 1302, 1310 (10th Cir. 1987), *cert. denied,* 488 U.S. 983 (1988); United States v. LaHue, 261 F.3d 993, 1014-15 (10th Cir. 2001); *See also* McGee v. Crist, 739 F.2d 505, 509 (10th Cir. 1984) (collecting cases);

Eleventh Circuit

United States v. Gottesman, 724 F.2d 1517, 1524 (11th Cir. 1984) (Court holds that it is bound by the Fifth Circuit decision in United States v. Thevis, *supra*, though noting that "[w]e recognize that a compelling argument can be made for a judicial grants of use immunity in extraordinary cases where prosecutorial misconduct has occurred in the handling of the immunity process" [citing the Fourth Circuit's decision in United States v. Klauber, *supra*]), *reh. denied*, 729 F.2d 1468 (11th Cir. 1984), *abrogated on other grounds*, Dowling v. United States, 473 U.S. 207 (1985);

District of Columbia Circuit

United States v. Perkins, 138 F.3d 421, 424 (D.C. Cir.) (upon court's discussing United States v. Lugg, 892 F.2d 101 [D.C. Cir. 1989]; and United States v. Heldt, 668 F.2d 1238 [D.C. Cir. 1981], *cert. denied*, 456 U.S. 926 [1982], it was reaffirmed that "it is not the proper business of the trial judge to inquire into the propriety of the prosecution's refusal to grant use immunity to a prospective witness." [internal quotes omitted]. Court recalled, however, that in Lugg it had been noted that "[s]ome cases have indicated that the government may be compelled to grant defense witness immunity in 'extraordinary circumstances."), *cert. denied*, 523 U.S. 1143 (1998). *But see* Earl v. United States, *supra*, (Burger, J.) 361 F.2d at 534, n. 1; United States v. Gaither, *supra*.

District of Columbia Court of Appeals

Carter v. United States, *supra*, 684 A.2d at 338-45 (upon rejecting Government of Virgin Islands v. Smith, court stated: "Preliminarily, we agree with the overwhelming number of courts, especially in the federal circuits, that have rejected the concept of *judicially imposed* immunity" [emphasis in original].*** "We agree with most federal circuit courts which have adopted what has been termed the 'prosecutorial misconduct' doctrine...[footnote omitted].")

* * *

As stated in Petitioner's initial application, this instant case presents an appropriate vehicle for the Supreme Court of the United States to address this issue once and for all, and thereby delineate the appropriate standard of analysis. Here, there is presented far more than a run-of-the mill immunity question involving some tangential witness sought to be called by the defense and who was said to possess some information which might have exculpated Petitioner. Rather, Claudia Seong was the central figure around whom the prosecution's entire case was theorized and developed. She was likewise integral to the strongly protested evidence of uncharged criminality, as well as to the repeatedly challenged hearsay statements, wherein her veracity remained unfettered by cross-examination.

Under such circumstances, depending on what standard of analysis might be embraced by this Court pursuant to plenary review, the arbitrary refusal to call Seong to the stand under a grant of immunity -- where the prosecutor specifically told the jury that Seong had not been involved in the charged homicide -- might well be viewed as having completely undermined Petitioner's due process right to confront relevant witnesses and properly defend himself against these charges.

Conclusion

As to Both Questions Presented, the Petition for a Writ of Certiorari Should Be Granted

Dated: New York, New York
October 28, 2005

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, DATED FEBRUARY 3, 2005

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Mazzarelli, J.P., Ellerin, Nardelli, Gonzalez, JJ.

Ind. 2449/98

The People of the State of New York,

Respondent,

-against-

Edmund Ko,

Defendant-Appellant.

Brafman & Ross, P.C., New York (Mark M. Baker of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

On remand to this Court from the Supreme Court of the United States:(__ US __,124 S Ct 2839 [2004]) for reconsideration in light of *Crawford v Washington* (541 US 36 [2004]), judgment, Supreme Court, New York County (Harold B.. Beeler, J.), rendered October 16, 2000, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Appendix A

The defense theory in this case featured an effort to establish that the murder of defendant's former girlfriend was most likely committed by defendant's new girlfriend and another person. At trial, the People presented, on their direct case, testimony by a detective recounting statements made by the girlfriend that a bloody shirt found at the murder scene belonged to her, but was often worn by defendant, and that the bloody pants found there belonged to defendant.

In our original decision (304 AD2d 451, 452 [2003]), we concluded that the court's evidentiary ruling permitting this evidence was a proper exercise of discretion. On reconsideration in light of *Crawford v Washington* (541 US 36, *supra*), we conclude that defendant preserved a Confrontation Clause argument with regard to the admissibility of this evidence, and that these statements were testimonial within the meaning of *Crawford* and were received for their truth. However, we find no basis for reversal.

Defendant opened the door to the admission of the entire statement concerning the clothing found at the murder scene by raising the issue of the clothing in his opening statement and in seeking, in opposition to the People's in limine motion, leave to introduce the girlfriend's statement that the shirt found belonged to her. Once defendant insisted upon introduction of the portion of the statement regarding the girlfriend's ownership of the shirt, the entire statement became admissible because the admission of that portion of the statement, by itself, would misrepresent the meaning of the conversation (*see e.g. People v Tamayo*, 256 AD2d 98 [1998], *lv denied* 93 NY2d 979 [1999]; *People v King*, 197 AD2d 440 [1993], *lv denied* 83 NY2d 855 [1994]; *People v Wortherly*, 68 AD2d 158, 161-163 [1979]). A contrary holding would allow a defendant to

mislead the jury by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context. Accordingly, we find no violation of defendant's right of confrontation (*see e.g. United States v Ramos,* 861 F2d 461, *468* [2d Cir 1988], *cert denied* 489 US 1071 [1989]; *but see United States v Cromer,* 389 F3d 662, 678-679 [6th Cir 2004]).

In any event, were we to find any error, we would find it to be harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt and the minimal impact of the challenged evidence.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 3, 2005

s/ Catherine O'Hague Wolfe
CLERK

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED APRIL 22, 2003

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

EDMUND KO,

Defendant-Appellant.

April 22, 2003

Nardelli, J.P., Mazzarelli, Rosenberger, Ellerin, and Gonzalez, JJ.

Judgment, Supreme Court, New York County (Harold Beeler, J.), rendered October 16, 2000, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The victim's statement to a friend in a telephone conversation shortly before the murder that "It's Ed. I have to go" was properly admitted under the present sense impression exception to the hearsay rule (*see People v. Brown*, 80 N.Y.2d 729). The statement was a spontaneous description of events as they were unfolding, and the

requirement of corroboration was fully satisfied by extensive circumstantial evidence including forensic evidence. Since the statement that defendant had actually arrived at the victim's apartment was properly admitted, any error with respect to the victim's prior declaration of defendant's intention to do so was harmless because such evidence was superfluous, and because of the overwhelming evidence of defendant's guilt.

Where the People's theory was that defendant murdered his former girlfriend to placate and impress his new girlfriend, the court properly exercised its discretion in ruling that defendant's participation with the new girlfriend in a knife attack on another one of his former girlfriends a few months before the murder was admissible on the issue of motive (*see People v. Walker*, 293 A.D.2d 411, *lv. denied* 98 N.Y.2d 682; *People v. Willsey*, 148 A.D.2d 764, *lv. denied* 74 N.Y.2d 749). The probative nature of this evidence outweighed any prejudicial effect. This evidence had a direct bearing on motive, because both crimes were committed for a very specific common purpose. The People were entitled to explain to the jury why defendant would kill a former girlfriend from whom he had separated on friendly terms and against whom he bore no apparent animosity.

Defendant was not deprived of any constitutional rights by the People's refusal to grant immunity to his new girlfriend (*see People v. Adams*, 53 N.Y.2d 241, 247; *People v. Shapiro*, 50 N.Y.2d 747). There was no bad faith or abuse of prosecutorial discretion. Furthermore, defendant's inability to call the new girlfriend as a witness because of her assertion of her Fifth Amendment privilege did not adversely affect his defense.

The court correctly determined that mitochondrial DNA analysis has been found reliable by the relevant scientific community, and that issues regarding contamination go to the weight to be given such evidence (*People v. Klinger*, 185 Misc.2d 574). We also note that many jurisdictions have accepted this type of DNA evidence (*see e.g. People v. Holtzer*, __ N.W.2d __ [Feb. 25, 2003], 2003 WL 722452 [Mich. App.]; *State v. Pappas*, 256 Conn. 854, 866-890, 776 A.2d 1091, 1101-1113).

The other challenged rulings were proper exercises of discretion which did not deprive defendant of his right to confront witnesses and present a defense (*see Crane v. Kentucky*, 476 U.S. 683, 689-690; *Delaware v. Van Arsdall*, 475 U.S. 673, 678-679).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 22, 2003

s/ David Spokany
DEPUTY CLERK

CLERK

APPENDIX C — ORDER OF THE NEW YORK STATE COURT OF APPEALS DENYING PERMISSION TO APPEAL, DATED JANUARY 2, 2004

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

EDMUND KO,

Appellant.

CERTIFICATE DENYING LEAVE

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certification pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
January 2, 2004

s/ Judith S. Kaye
Chief Judge

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* Order of the Appellate Division, First Department, entered April 22, 2003, unanimously affirming a judgment of the Supreme Court, New York County, rendered October 16, 2000.

APPENDIX D — CERTIFICATE DENYING LEAVE OF THE NEW YORK STATE COURT OF APPEALS DATED AUGUST 29, 2005

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

Edmund Ko,

Appellant.

UPON RECONSIDERATION

CERTIFICATE
DENYING
LEAVE

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

* Order of the Appellate Division, First Department, entered February 3, 2005, after remand from the Supreme Court of the United States, affirming a judgment of the Supreme Court, New York County, rendered October 16, 2000.

Appendix D

Dated at New York, New York, August 29, 2005

s/ Judith S. Kaye
Chief Judge